ABDUL LATIF MOHAMED IBRAHIM

v.

INTERNATIONAL FACTORS LEASING PTE LTD

COURT OF APPEAL, KUALA LUMPUR
HAIDAR MOHD NOOR JCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-02-543-1999]
10 MARCH 2001

CIVIL PROCEDURE: *Judgment - Foreign judgment - Registration of foreign judgment - Application to set aside - Delay - Application made after statutory 14-day period - Whether applicant "competent" to apply to set aside - Extension of time - Whether to be granted - Reciprocal Enforcement of Judgments Act 1958, s. 5 - Rules of the High Court 1980, O. 3 rr. 5(1), (2), O. 67 r. 5(3)*

WORDS & PHRASES: *"Competent" - Order 67 r. 5(3) Rules of the High Court 1980 - Whether relates to status of party*

The respondent had obtained summary judgment against the appellant in Singapore ('the Singapore judgment'). On 29 November 1994 the respondent registered the Singapore judgment in the High Court in Malaya, and on 12 January 1995, they served the order of registration and the notice to judgment debtor on the appellant. Service of the documents, apparently, was effected by one Mahamud, a clerk of the respondent's solicitors in Malaysia. It was not in dispute that the notice in question gave the appellant 14 days within which to apply to set aside the order of registration. The appellant did not comply with the notice, and it was not until 27 January 1998, that the appellant applied for an extension of time to set aside the registration of the Singapore judgment and for the setting aside of that judgment pursuant to s. 5 Reciprocal Enforcement of Judgments Act 1958 and O. 67 Rules of the High Court 1980 ('RHC').

In his affidavit in support of the application, the appellant explained the delay by affirming that: (i) he had never been served with the documents of service by Mahamud; (ii) he only came to know about the Singapore judgment on 17 April 1997; and (iii) he needed time to go the root of it all and to appoint solicitors in Singapore. These affidavit evidence notwithstanding, the appellant's summons was dismissed by the senior assistant registrar ('SAR'), citing the appellant's delay in filing the application for extension of time as ground for her decision. The appellant appealed but the appeal was dismissed by the

learned judge on grounds that: (i) the length of the delay and the reasons for the delay was purely the doing of the appellant; and (ii) upon the proper construction of O. 67 r. 5(3) of the RHC read with O. 3 r. 5 thereof, and the principle enunciated in *Tan Ah Chai v. Loke Jee Wah* and *DP Vijandran v. Majlis Peguam*, the appellant ought to have filed the application for extension on or before 26 January 1995, and his failure to do that made him incompetent to so apply to set aside the registration. Dissatisfied, the appellant appealed further.

Held:
Per Haidar Mohd Noor JCA

[1] The learned judge erred when he concluded that the appellant ought to have filed the application for an extension of time within the time while it remained competent for the appellant to set aside the registration, *ie*, on or before 26 January 1995.

[2] The word "competent" in O. 67 r. 5(3) RHC did not relate to the 14-day time frame within which the appellant must file the application to set aside the registration, but referred rather to the status of the party, *ie*, if the applicant is declared a bankrupt etc. It would also be noted that the facts and issues in *Tan Ah Chai* and *DP Vijandran* were different and of no assistance to the facts and issues in the present case. These aside, O. 3 r. 5(2) RHC gave the power to the court to extend any such period, although the application for extension was not made until after the expiration of the period. The appellant was therefore competent to file the application even after the expiry of the period ordered by the court.

[3] It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affect his rights, he must do so timeously. It is also clear that in all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it.

[4] There was no explanation for the delay in filing for an extension of time seeking to set aside the registration of the Singapore judgment other than in rebuttal. The grounds put forward by the appellant were more on the attack of the Singapore judgment.

[4a] Since the learned judge had ruled that the appellant had been served with the registration order of the Singapore judgment, and since the appellant had denied service of the same, it was open to the appellant to cross-examine Mahamud on the contents of his affidavit on the service issue pursuant to O. 38 r. 2(3) RHC. The appellant failed to invoke this

order. That being so, the learned judge was entitled to come to the finding that the documents had indeed been served on him by Mahamud and that there was a delay of about three years. The learned judge was thus correct in saying that "the length of delay and the reasons for the delay were purely the doing of the appellant".

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memperolehi penghakiman terus terhadap perayu di Singapura ('penghakiman Singapura tersebut'). Pada 29 November 1994, responden telah mendaftarkan penghakiman Singapura tersebut dalam Mahkamah Tinggi Malaya, dan pada 12 Januari 1995, mereka telah menyampaikan perintah pendaftaran dan notis kepada penghutang penghakiman ke atas perayu. Penyampaian dokumen-dokumen tersebut, dikatakan, telah dilaksanakan oleh seorang bernama Mahamud, kerani peguamcara responden di Malaysia. Adalah tidak dipertikaikan bahawa notis yang dipersolakan telah memberikan perayu 14 hari dalam mana untuk memohon mengenepikan perintah pendaftaran tersebut. Perayu telah tidak mematuhi notis tersebut,dan adlah hanya sehingga 27 Januari 1998, barulah perayu memohon untuk mendapatkan perlanjutan tempoh untuk mengenepikan pendaftaran penghakiman Singapura tersebut dan untuk pengenepian penghakiman tersebut selaras dengan s. 5 Akta Penguatkuasaan Bersaling Penghakiman 1958 dan A. 67 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Dalam afidavit beliau bagi menyokong permohonan tersebut, perayu telah menerangkan kelewatan tersebut dengan mengikrarkan bahawa (i) beliau telah tidak pernah disampaikan dengan dokumen-dokumen tersebut oleh Mahmud; (ii) beliau hanya mengetahui mengenai penghakiman Singapura tersebut pada 17 April 1997; dan (iii) beliau memerlukan masa untuk mendalami perkara tersebut dan untuk melantik peguamcara di Singapura. Keterangan afidavit ini, meskipun adanya, saman perayu telah ditolak oleh pendaftar yang bijaksana ('PKP'), yang menyebut kelewatan perayu dalam memfailkan permohonan unuk perlanjutan masa sebagai alasan bagi keputusan beliau. Perayu telah merayu tetapi rayuan tersebut telah ditolak oleh hakim yang bijaksana atas alasan bahawa: (i) tempoh masa kelewatan dan alasan bagi kelewatan tersebut adalah semata-mata atas perbuatan perayu sendiri; dan (ii) atas pembentukan sempurna A.67 k. 5(3) KMT yang dibaca bersama dengan A. 3 k. 5, dan prinsip yang disebut dalam *Tan Ah Chai lwn. Loke Jee Wah* dan *DP Vijandran lwn. Majlis Peguam,* perayu sepatutnya telah memfailkan permohonan untuk perlanjutan pada atau sebelum 26 Januari 1995, dan kegagalan beliau berbuat sedemikian menjadikannya tidak kompeten untuk memohon sedemikian bagi mengenepikan pendaftaran tersebut. Perayu yang tidak berpuashati telah merayu selanjutnya.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Hakim yang bijaksana tersalah pertimbangan ketika beliau memutuskan bahawa perayu mestilah memfailkan permohonan untuk perlanjutan masa di dalam lingkungan masa ketika ianya kekal kompeten untuk perayu mengenepikan pendaftaran tersebut, iaitu pada atau sebelum 26 Januari 1995.

[2] Perkataan "kompeten" dalam A. 67 k. 5(3) KMT tidak berkaitan dengan tempoh masa 14 hari dalam mana perayu mesti memfailkan permohonan untuk mengenepikan pendaftaran tersebut, tetapi sebaliknya merujuk kepada status pihak tersebut, iaitu contohnya jika pemohon dijadikan bankrap. Diperhatikan juga bahawa fakta-fakta dan isu-isu dalam *Tan Ah Chai* dan *DP Vijandran* adalah berlainan dan tidak membantu fakta-fakta dan isu-isu dalam kes semasa. Selain dari perkara ini, A. 3 k. 5(2) KMT memberikan kuasa kepada mahkamah untuk melanjutkan sebarang masa yang sedemikian, walaupun permohonan untuk perlanjutan tidak dibuat sehingga selepas perluputan tempoh tersebut. Perayu dengan itu kompeten untuk memfailkan permohonan meskipun selepas perluputan tempoh tersebut yang diperintah oleh mahkamah.

[3] Ianya merupakan prinsip undang-undang yang penting bahawa apabila seseorang litigan memohon pencelahan mahkamah dalam sesuatu perkara yang menjejaskan haknya, beliau mestilah melakukan sedemikian pada masanya. Ianya juga jelas bahawa dalam kesemua kes-kes dalam mana kelewatan menghampiri mahkamah adlah isunya, beban terletak ke atas litigan yang telah lewat memberikan penjelasan yang memuaskan baginya.

[4] Tidak terdapat sebarang penjelasan bagi kelewatan dalam pemfailan untuk mendapatkan perlanjutan masa bagi mengenepikan pendaftaran penghakiman Singapura tersebut selain daripada dalam pematahan. Alasan-alasan yang dikemukakan oleh perayu adalah lebih kepada serangan penghakiman Singapura tersebut.

[4a] Oleh kerana hakim yang bijaksana telah memutuskan bahawa perayu telah disampaikan dengan perintah pendaftaran penghakiman Singapura, dan oleh kerana perayu telah menafikan penyampaiannya, ianya adalah terpulang kepada perayu untuk memeriksa balas Mahamud mengenai kandungan afidavit beliau mengenai isu penyampaian selaras dengan A. 38 k. 2(3) KMT. Perayu gagal untuk menggunakan perintah ini. Dalam keadaan yang sedemikian, hakim yang bijaksana berhak untuk mencapai keputusan bahawa dokumen-dokumen tersebut telah sesungguhnya

disampaikan ke atas beliau oleh Mahamud dan bahawa terdapatnya kelewatan selama tiga tahun. Hakim yang bijaksana dengan itu telah bertindak dengan betul dalam menyatakan bahawa "the length of delay and the reasons for the delay was purely the doing of the apellant".

[Rayuan ditolak.]

Case(s) referred to:
DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 ***(refd)***
Gomez v. Gomez [1969] 1 MLJ 228 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***
RHB – Cathay Securities Pte Ltd v. Lim Bee Keong [1999] 5 MLJ 641 ***(refd)***
Tan Ah Chai v. Loke Jee Wah [1998] 4 CLJ 73 ***(refd)***

Legislation referred to:
Reciprocal Enforcement of Judgments Act 1958, s. 5
Rules of the High Court 1980, O. 3 r. 5(1), (2), O. 38 rr. 1, 2(3), O. 67 rr. 5(3), 7

For the appellant - RR Sethu; M/s RR Sethu
For the respondent - Teng Chong Moi; M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R3-24-106-1994]

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor JCA:

This is an appeal against the decision of the learned judge affirming the decision of the senior assistant registrar ("SAR") who dismissed the appellant's summons to set aside the registration of a Singapore High Court judgment obtained by the respondent.

Background Facts

On or about 4 August 1993, the respondent granted a loan in the sum of SD1.9 million to Winds Cruises Pte Ltd ("Winds Cruises"). The loan was guaranteed by, *inter alia,* the appellant pursuant to a guarantee dated 4 August 1993.

Wind Cruises defaulted in the said loan.

The respondent commenced proceedings in the High Court of Singapore *vide* writ no. 967 on 16 June 1994 against, *inter alia,* the appellant (cited as the 6th (sixth) defendant) pursuant to the guarantee dated 4 August 1993 executed by him as a director of Winds Cruises. ("Singapore proceedings"). The appellant did not deny the execution of the guarantee.

The respondent purportedly served the sealed writ on the appellant by letter dated 4 July 1994 sent by AR registered post through its solicitors in Singapore at the appellant's address in Kuala Lumpur.

Appearance was purportedly entered on the appellant's behalf by a firm of solicitors in Singapore on 9 July 1994 under the authority to act, signed by one Wee Toon Boon, the seventh defendant, on his behalf.

The respondent thereafter filed an application under O. 14 in the Singapore proceedings for final judgment against, *inter alia,* the appellant.

On 19 September 1994, summary judgment was entered against the appellant for the sum of SD1,968,335.36 as at 31 May 1994 and interest on the said sum at the default rate of 18% per annum and accumulated by way of compound interest with monthly rests from 1 June 1994 until payment ("Singapore judgment").

On 29 November 1994, the Singapore judgment was registered in the High Court of Malaya at Kuala Lumpur. The order dated 29 November 1994 and the notice to judgment debtor of the registration of the foreign judgment dated 11 January 1995 were served **personally** on the appellant on 12 January 1995 *vide* letter dated 11 January 1995 from Messrs Shook Lin & Bok, Advocates & Solicitors here. The service was effected by one Mahamud bin Mansor, a clerk of Messrs Shook Lin & Bok.

At the time of the application to set aside the order of the registration of the Singapore judgment, no attempt was made by the appellant to set aside the Singapore judgment.

Be that as it may, we now proceed to consider the application of the appellant that was dismissed in the court below and which is the subject matter of the appeal before us.

The Application

In his application, the appellant prayed for, *inter alia,*:

(i) extension of time to file the application to set aside the Singapore judgment;

(ii) that the registration of the Singapore judgment be set aside pursuant to s. 5 of the Reciprocal Enforcement of Judgments Act 1958 ("the Act") and O. 67 of the Rules of the High Court 1980 ("RHC").

Extension Of Time To File The Application

It would appear that the application of the appellant was dismissed by the SAR solely on the ground of delay in filing the application for extension. The learned judge held that the SAR had rightfully exercised her discretion not to grant an extension of time. According to the learned judge, the length of delay and the reasons for the delay was purely the doing of the appellant.

The issue before us is whether the court below had correctly exercised the discretion not to grant an extension of time.

We shall deal first with the learned judge's construction of O. 67 r. 5(3) of RHC which reads:

> The Court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.

According to the notice of the registration of the foreign judgment issued by the High Court at Kuala Lumpur, the appellant was given liberty to apply to set aside the said registration within 14 days after service upon him at his last known address at No. 1530 Jalan Kasawari Taman Ulu Kelang Ampang, 68000 Kuala Lumpur of notice of such registration pursuant to O. 67 r. 7 of RHC or upon any of the grounds set out in s. 5 of the Act.

According to the learned judge as the notice to the appellant on the registration of the Singapore judgment was served on him on 12 January 1995 *vide* the affidavit of service of Mahamud bin Mansor dated 13 January 1995 in order for him to set aside the registration of the Singapore judgment he has to file the application on or before 26 January 1995, that is, 14 days from 12 January 1995. In this case, the appellant filed the application on 27 January 1998.

The learned judge, after considering the effect of the specific provision of O. 67 r. 5(3) *vis-a-vis* the general provision of O. 3 r. 5 of RHC and applying the principle in *Tan Ah Chai v. Loke Jee Wah* [1998] 4 CLJ 73 and *D.P. Vijandran v. Majlis Peguam* [1994] 3 MLJ 576, came to a finding that the specific provision must be read as a proviso to the general provision for an extension of time. He concluded thus:

> The 6th Defendant must file the application for an extension of time within the time while it remained competent for the 6th Defendant to set aside the registration. Hence the application for an extension of time should have been made on or before 26.1.95.

With respect, we disagree for the following reasons:

(a) The facts/issues in *Tan Ah Chai* and *D.P. Vijandran* are different and are of no assistance to the facts/issues in this case.

(b) The word "competent" relates to the status of the party, ie, if the applicant is declared a bankrupt, as contended by Dato R.R. Sethu of counsel for the appellant and which we tend to agree.

(c) Order 3 r. 5 of RHC clearly provides the answer:

(i) Order 3 r. 5(1) gives the power to the court to extend the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.

(ii) Order 3 r. 5(2) clearly gives the power to the court to extend any such period as is referred to in O. 3 r. 5(1) **although the application for extension is not made until after the expiration of the period**.

In the result, we are of the view that the appellant was competent to file the application even after the expiry of the period ordered by the court.

It is then a matter for us to consider whether the appellant has placed sufficient material or grounds for the court to exercise its discretion in his favour on the delay in making the application.

For a start, it is trite law that an appellate court should be slow to disturb the exercise of the discretionary power of the trial court.

This court in dealing with the delay point in *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396 said at p. 401:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously. The *maxim vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a Court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.

The burden therefore falls on the appellant to render satisfactory explanation or to lay sufficient material for the court to consider the delay in making the application for an extension of time. The learned judge stated that no explanation was given in the affidavit of the appellant in support of the

application as to why an application for an extension of time was not made since 26 January 1995. The learned judge further stated that it was only in rebuttal that the appellant said:

(i) was never served with the registration order;

(ii) not his signature;

(iii) know of the order (judgment) only on 17 April 1997.

We have examined the affidavit of the appellant in support of the application and agree with the learned judge's finding that there was no explanation for the delay in filing for an extension of time seeking to set aside the registration of the Singapore judgment other than in rebuttal. The grounds put forward were more on the attack of the Singapore judgment.

The learned judge found as a fact that there was evidence to show that the appellant had been served with the registration order of the Singapore judgment. This evidence is by way of the affidavit of service of Mahamud bin Mansor, a clerk of Messrs Shook Lin & Bok, advocates & solicitors in Kuala Lumpur, acting for their counterpart in Singapore. This is what Mahamud stated at para. 2 of his affidavit:

> Encik Abdul Latiff bin Mohamad Ibrahim telah mengaku kepada saya bahawa beliau adalah penama yang tercatit di dalam Notis berkenaan dan menandatangani penerimaan pada salinan pruf Perintah, Notis dan surat iringan yang disertakan di sini masing-masing bertanda eksibit "MM-1", "MM-2" dan "MM-3".

However, the appellant in his affidavit in reply dated 14 April 1998 denied service of the documents on him as claimed by Mahamud. The appellant said he never signed the letter (exh. "MM-3"). The alleged signature was not his. Hence he was unable to set aside the registration of the judgment within the stipulated time since he only had knowledge of the said judgment on 17 April 1997 and he needed time to get to the root of it and had to appoint solicitors in Singapore.

Dato' R.R. Sethu of counsel for the appellant therefore submitted that in the face of the denial by the appellant in respect of his alleged signature and in the absence of cross-examination, it is not possible to make such a finding. He further submitted that despite the appellant's denial, Mahamud was not asked to swear a more full and complete evidence of service. There was no evidence that the appellant was personally known to Mahamud or that someone else had pointed out the appellant to Mahamud.

In our opinion as the issue relates only on the service of the documents on the appellant and not to a question to be tried in the action, it is open to the appellant to cross-examine Mahamud on the contents of his affidavit on the service issue. This he can do by seeking leave of the court pursuant to O. 38 r. 2(3) of RHC. Raja Azlan Shah J (as His Royal Highness then was) has the occasion to consider O. 38 r. 1 of the then Rules of Supreme Court 1957 (which is our present O. 38 r. 2(3) of RHC) and its application in *Gomez v. Gomez* [1969] 1 MLJ 228 at p. 229:

> It is also settled law that if the issue in the case relates, not to controverted facts appearing on the face of the affidavits but to an issue which must be tried in the action, then Order 38 rule 1 does not apply; see *Abrahams & Co. v. Dunlop Pneumatic Tyre Company & Ors.* [1905] 1 KB 46, 52 where Mathew LJ in considering the provisions of the (English) Order 38 rule 1, which is the same as ours said:
>
> > That applies only to a question of fact which the court or a judge has at the time jurisdiction to decide, and not to a question to be tried in the action.

In this case the court below has the jurisdiction to decide whether it was a fact or not that service of those documents were effected personally on the appellant by Mahamud. In fact Mahamud, in our view, had sworn a full and complete evidence of service. It was not necessary for evidence to be shown that the appellant was known personally to Mahamud or that someone else had pointed out the appellant to Mahamud as contended by Dato' R.R. Sethu in the face of the admission by the appellant as deposed by Mahamud that he was the person named in those documents. The burden then falls on the appellant to show otherwise and the best way to do so is by invoking O. 38 r. 2(3) of RHC. Mere denial does not help the appellant. He did not say for example that at the material time of the service of those documents, he was not at the stated address but was somewhere else or he had changed his address. With the benefit of the cross-examination of Mahamud only then would the court be in a position to come to a finding whether Mahamud's affidavit can be accepted or not.

As the appellant failed to invoke O. 38 r. 2(3) of RHC, the learned judge, in our view, was on the material before him entitled to come to his own finding that these documents were indeed served on him by Mahamud. There was a delay of about three years.

By his own affidavit dated 24 January 1998 the appellant at para. 28 admitted that he was made aware of the Singapore judgment on 17 April 1997 by Messrs Syed Ibrahim and he needed time to appoint solicitors in Singapore to get the documents and all this took time. The learned judge stated that all the relevant facts were then known to him and yet he did not take immediate steps to set aside the Singapore judgment.

We do not propose to go into minute details of the appellant's conduct regarding the delay and suffice for us to say that the learned judge was correct when he said "The length of delay and the reasons for the delay was purely the doing of the 6th defendant".

We must caution the litigants of the importance and need to comply with the Rules of Court and we quote what Lord Guest said in *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228 at p. 229:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

For the reasons stated, we see no grounds for us to disturb the decision of the learned judge when he affirmed the decision of the SAR in refusing the application for extension of time by the appellant.

On this ground alone, the appeal should be dismissed.

We do not see the need for the learned judge to consider the merits of the application once he ruled that the application for extension of time was rightly refused by the SAR. Hence we do not propose to consider the merits of the application in view of our decision on the extension of time. We agree with the learned judge in *RHB – Cathay Securities Pte. Ltd. v. Lim Bee Keong* [1999] 5 MLJ 641 that once the prayer for extension of time was dismissed the other application for setting aside the foreign judgment did not arise.

In the circumstances, we dismiss the appeal on this ground alone with costs. The order of the High Court is affirmed. Deposit to the respondent on account of taxed costs.